

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9797 OF 2004

Shri.Rafiq Ahmed Parkar & anr. ..Petitioners.

Vs.

Konkan Mercantile CO-operative

Bank Ltd. & Ors. ..Respondents.

....

Mr.M.B.Baadkar for the Petitioners.

CORAM : DR.D.Y.CHANDRACHUD, J.

12th April, 2005.

P.C. :

The Co-operative Appellate Court allowed the appeal preferred by the First Respondent Bank and while doing so held that the Petitioners as guarantors would be jointly and severally liable. The submission which has been urged before the Court is that the liability of the Petitioners as guarantors stood discharged under Section 139 of the Contract Act on the ground that the Bank had

allowed the removal of the hypothecated machinery and moveables lying in the factory and had consequently done or omitted to do an act as a result of which the remedy of the surety against the principal debtor would be impaired. The Co-operative Court has dealt with this submission in paragraph 10 of the impugned order. The Co-operative Appellate Court noted that first and foremost there was no such plea in the written statement. But that apart, on merits it had emerged in the course of the evidence that on 5th December, 1991, the principal debtor had addressed a letter to the bank to the effect that the machinery and other moveables had been removed from the factory to some other place after it was found that the doors of the factory were in a broken condition. The second witness who adduced evidence on behalf of the bank deposed of the steps which were taken by the bank upon the aforesaid letter. The Co-operative Appellate Court has held that though the bank could have been more vigilant, the liability of the Petitioners as guarantors could not stand discharged merely because after receipt of the letter dated 5th December, 1991, the Bank could not lay its hands on the machinery or other

moveable property of the principal debtor. In paragraph 12, the Co-operative Appellate Court noted that the bank came to know of the shifting of the machinery and other moveable property after receipt of the letter dated 5th November, 1991. Hence, it could not be held that the liability of the Petitioners as guarantors stood discharged. This finding which has been arrived at by the Co-operative Appellate Court is a possible finding that could have been arrived at on the basis of the evidence on the record. In the exercise of the supervisory jurisdiction under Article 227, this Court would not be justified in substituting its own opinion for the considered exercise of the discretion of the First Appellate Court which is based on the evidence on the record. There is no dispute about the fact that the Petitioners are guarantors. Their liability does not stand discharged. There is no merit in the Petition, which is accordingly rejected.